



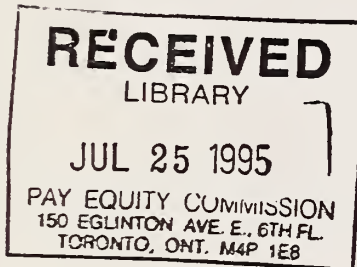
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BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario Human Rights Code, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Mark Daniels dated April 26, 1991, alleging discrimination in employment on the basis of race and colour and harassment by the Regional Municipality of Hamilton-Wentworth Police Services Board.

BETWEEN:



Mark Daniels

Complainant

- and -

The Regional Municipality of Hamilton-Wentworth Police Services Board

Respondent

AMENDED INTERIM DECISION

Adjudicator : Paula Knopf

Date : July 21, 1995 (amendment to decision dated May 31, 1995)

Board File No: 93-0013

Decision No : 95-0019-I (A)

The complaint in this case alleges discrimination on the basis of race as a result of alleged different treatment by the Respondent. The Complainant alleges differential treatment as a probationary police constable on account of race. The position of the Respondent, from the outset, has been that the complaint is frivolous and vexatious. The Respondent has put the Complainant and the Commission on notice that the Respondent will be seeking an order of costs at the end of the day. In the course of cross-examination of the Complainant, counsel for the Respondent sought to ask a series of questions concerning details of the investigation and decision making process between the Complainant and the Commission in this matter. The Respondent seeks to cross-examine the Complainant on the following issues:

1. Whom did the Complainant initially identify to the Commission as the white probationary police constables who had been treated differently than he had been treated?
2. When did Mr. Daniels [the Complainant] communicate this information to the Commission?
3. Did the Commission accept that the white probationary constables identified by the Complainant had been treated differently?
4. When did the Commission communicate this conclusion to the Complainant?
5. Following the documentary productions made by the Respondent Police, whom did the Commission identify as white probationary constables who had been treated differently than the Complainant?
6. When did the Commission so identify these white probationary police constables?
7. Did the Complainant Daniels agree that these additional white probationary constables had been treated differently?
8. When did the Complainant Daniels agree with the constables identified by the Commission?

9. When did the Complainant Daniels examine the documentary productions made by the Respondent Police?
10. Did the Complainant Daniels identify any additional white probationary constables whom he claimed had been treated differently? If so, when did he so identify these additional white probationary constables?
11. Did the Commission agree that these additional white probationary constables had been treated differently than Daniels? If so, when did they so agree?

Counsel for the Commission objected to cross-examination on the areas above, asserting that the questions probed into matters which, as a matter of discretion, ought not to be the subject of cross-examination. Further, it was argued that the questions were irrelevant to the merits of the case. After hearing brief, oral submissions from the parties, the Board of Inquiry invited counsel to make written submissions on the issue. The written submissions were prepared and exchanged. Once they were all filed, the Board of Inquiry rendered an oral ruling to the parties on April 24, 1995. This interim order confirms and amplifies that oral ruling.

The Respondent is asserting that it wishes to pursue this line of inquiry with the Complainant in order to establish an evidentiary foundation for the Respondent's claim for costs. Given the fact that the Commission had indicated that it would not call the Commission's investigator or any authors of the Commission's case summary as witnesses in the case, the Respondent argued that the only Commission witness with any knowledge about this matter would be the Complainant himself. The Respondent relied heavily on the recent decision of the Divisional Court in *Northwestern Hospital, Ontario (Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital)* [1993] O.J. No. 3380 Action No. 520/93. The Respondent relies upon the following principles which were established in the *Northwestern* case.

1. "... in the appropriate case, justice will be better served in proceedings under the Human Rights Code when there is complete information available to the Respondents";

2. "the *fruits of the investigation* are not the property of the Commission";
3. the investigation stage must be distinguished from the litigation stage where a Board of Inquiry has been appointed, and where documents are prepared to assist counsel in the prosecution of the case;
4. the investigation stage is subject to the statutory mandate to endeavour to effect a settlement, not to prepare for litigation. The earliest stage at which litigation privilege can be asserted is once it appears to the Commission that the possibilities for settlement have been exhausted and that the recommendation to appoint a Board of Inquiry is appropriate;
5. there is no general "class privilege" for all communications between complainants and the Commission. Any individual communication must be examined for the four elements of the Wigmore test, but especially the expectation that the communications originate with an expectation of privacy;
6. the scope of natural justice is determined by the circumstances of the particular case. Allegations of racial discrimination are extremely serious. Witness statements made by complainants to the Commission are available for disclosure.

Counsel for the Respondent also argued that there is a connection between an expected decision on the merits in this case and the evidence he seeks to introduce in support of the application for costs. The Respondent made several allegations concerning the propriety of the investigation, allegations concerning the reasonableness of the basis for the conclusion that the Complainant had been treated differently from white probationary constables with comparable performance records and alleged failures of the Commission to make proper disclosure or indicate the foundation for the allegations of discrimination. It was submitted that the proposed questions were directed towards elements of bad faith and vexatiousness in the administration of the complaint and are therefore relevant to the issue of costs. Reliance was placed on *Pham v. Beach Industries*, (1987) 8 C.H.R.R. D/4008.

In response, the Commission took the position that the Respondent ought not to be allowed to question the Complainant about matters that are only relevant to the potential issue of costs. It was argued that since costs are to be considered only upon the dismissal of a complaint by a Board of Inquiry under Section 40(6) of the Code, there should be considered no "nexus" between the proposed questions and any fact that is in issue on the substance of the complaint. It was argued that none of the proposed questions are relevant or could be relevant unless the Commission decided to call the investigating officers and introduce their testimony about their relationship with the Complainant. Further, or in the alternative, it was argued that the questions should be disallowed on the basis of public policy because it would invite Boards of Inquiry to delve into the relationship between the Complainant and the Commission and lead to potential "fishing exhibitions" by respondents. Further, it was argued that these types of questions would cast a chilling effect on future complainants and make them reluctant to come forward with a complaint. Counsel for the Commission accepted the authority of the *Northwestern Hospital* case, but argued that this case ought to be distinguished because it is not a situation where disclosure was being refused. Finally, it was submitted that the Respondent would not be denied fundamental fairness because in the event that the case is decided in its favour, it would still have available to it the opportunity of arguing that the complaint was frivolous, vexatious and made in bad faith. It was submitted that the inquiry into the kinds of questions that the Respondent seeks to ask could be conducted at that time.

In reply, the Respondent argued that balance of convenience favours allowing the Respondent to question the Complainant during the course of his cross-examination rather than bifurcating the hearing. Secondly, it was argued that the Respondent ought not to be restricted in pursuing the issue of costs on the basis of the witnesses that the Commission chooses to call. Third, it was suggested that the questions "have nothing to do with the relationship between the Commission and the Complainant" but rather relate to the evidence upon which the Complainant initially relied in his claim. Finally, it was argued that none of the inquiries relate to information which should reasonably be expected to be private and the *Northwestern Hospital* case is applicable to the situation.

The Decision

I agree completely with the principle expressed in *R. v. Stinchcombe*, which is quoted in the *Northwestern Hospital* case wherein Mr. Justice Sopinka said:

Justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. It does not take a quantum leap to come to the conclusion that in the appropriate case, justice will be better served in the proceedings under the *Human Rights Code* when there is complete information available to the respondents.

As I have advised the parties several times during the course of these proceedings, the exchange of information is to be encouraged. Any indication that information is being withheld must be abhorred. It is trite to say that open communication speeds up the process and allows counsel to better present and defend their positions. It eliminates the waste of valuable time during a hearing and it allows the tribunal to concentrate upon the merits and the substance of a dispute. Because of these principles, one should encourage any concept that would support disclosure during the course of a hearing or prior to the hearing itself.

However, these principles and concepts have to be balanced with the need to keep control over proceedings and to best ensure the proper focus on the merits or the substance of a case. In the case at hand, the Respondent is seeking information to assist it in its claim for costs against the Commission. Whether the information being sought is relevant to that question is not the question I am asking myself now. The simple question at this point in the proceedings is whether the Complainant should be subjected to cross-examination on these questions at this stage in the proceedings.

Bifurcation of proceedings is never to be encouraged. A decision that would ultimately result in bifurcation should not be taken lightly. However, if the Respondent was allowed to pursue the line of questioning that is the subject of this motion, the questions would focus the Inquiry upon the relationship between the Human Rights Commission and the Complainant. There is no suggestion that the questions go to the merits of the case. Instead, it goes to the dynamics of the relationship between the Commission and the Complainant. If the Inquiry were to delve into this area, it cannot be

seen how it would assist on a determination of the merits. But equally importantly, the line of questioning could jeopardize the relationship of counsel for the Commission *vis-a-vis* the Complainant. It is to be noted that counsel for the Commission is relatively new to these proceedings. The questions themselves, that the Respondent has articulated at this stage, relate to agreements of and opinions of the Human Rights Commission and the Complainant which were formulated and taken prior to the present counsel being retained. Counsel for the Commission is not representing the Complainant. However, to focus on the relationship between the Complainant and the Commission at a time before this counsel was retained could put the position of counsel for the Commission in jeopardy and very much complicate the proceedings without advancing the merits of the Respondent's defence.

There is no suggestion that the information is relevant to or critical to the Respondent's defence of the complaint. There is no suggestion that the evidence is necessary to assist the Respondent in answering the Commission's case as was the situation in the *Northwestern Hospital* case. The information being requested is not, as in *Northwestern Hospital*, information relating to the investigation. Instead, it relates to the opinions formulated by the Commission and the Complainant as the investigation progressed. This information may well be relevant to the cost issue in the event that the complaint is dismissed. But at this stage, opinions and agreements or disagreements *vis-a-vis* the Complainant and the Commission are not relevant to the merits of the case between the Complainant and the Hamilton Wentworth Police Department.

As the Respondent says in its submissions, the purpose of these questions is to "pursue the evidentiary foundation for its claim for costs." The Respondent's desire to pursue a claim for costs was made evident on the first day of these proceedings. Its right to preserve such a claim will not be denied. But to allow it to cross-examine the Complainant on this issue at this time will complicate the evidence, will not advance defence and it will not shed light on the merits of the case.

Therefore, having taken all these factors into consideration, I indicated to the parties that I was reserving a ruling on the admissibility of this evidence until and unless I am presented with a rekindling of the request for a claim for costs in the event that the complaint is dismissed. If that occurs, and the Respondent wishes to pursue the claim for costs, I will, at that time retain jurisdiction over the matter and will issue upon request an order compelling the Commission to produce particulars concerning the items

being sought by the Respondent at this time. If the need arises, I will also be able to issue appropriate subpoenas to compel the attendance of the appropriate witnesses.

These reasons were articulated to the parties on April 24, 1995. The purpose of this Award is to clarify and record the reasons for that ruling.

DATED at Toronto, Ontario, this 21st day of July 1995.


Chair
Board of Inquiry

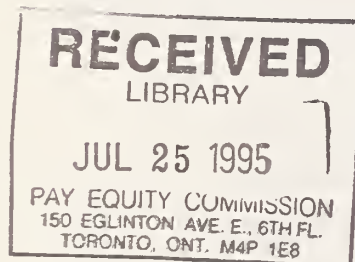


BOARD OF INQUIRY (*Human Rights Code*)

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AND IN THE MATTER OF the complaint by Mark Daniels dated April 26, 1991, alleging discrimination in employment on the basis of race and colour and harassment by the Regional Municipality of Hamilton-Wentworth Police Services Board.

B E T W E E N :



Mark Daniels

Complainant

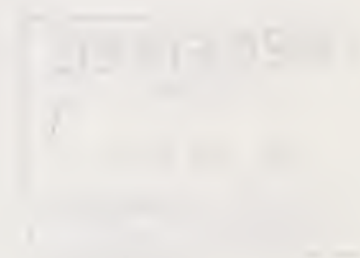
- and -

The Regional Municipality of Hamilton-Wentworth Police Services Board

Respondent

AMENDED INTERIM DECISION

Adjudicator : Paula Knopf
Date : July 21, 1995 (amendment to decision dated May 31, 1995)
Board File No: 93-0013
Decision No : 95-0019-I (A)



The complaint in this case alleges discrimination on the basis of race as a result of alleged different treatment by the Respondent. The Complainant alleges differential treatment as a probationary police constable on account of race. The position of the Respondent, from the outset, has been that the complaint is frivolous and vexatious. The Respondent has put the Complainant and the Commission on notice that the Respondent will be seeking an order of costs at the end of the day. In the course of cross-examination of the Complainant, counsel for the Respondent sought to ask a series of questions concerning details of the investigation and decision making process between the Complainant and the Commission in this matter. The Respondent seeks to cross-examine the Complainant on the following issues:

1. Whom did the Complainant initially identify to the Commission as the white probationary police constables who had been treated differently than he had been treated?
2. When did Mr. Daniels [the Complainant] communicate this information to the Commission?
3. Did the Commission accept that the white probationary constables identified by the Complainant had been treated differently?
4. When did the Commission communicate this conclusion to the Complainant?
5. Following the documentary productions made by the Respondent Police, whom did the Commission identify as white probationary constables who had been treated differently than the Complainant?
6. When did the Commission so identify these white probationary police constables?
7. Did the Complainant Daniels agree that these additional white probationary constables had been treated differently?
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9. When did the Complainant Daniels examine the documentary productions made by the Respondent Police?
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Counsel for the Commission objected to cross-examination on the areas above, asserting that the questions probed into matters which, as a matter of discretion, ought not to be the subject of cross-examination. Further, it was argued that the questions were irrelevant to the merits of the case. After hearing brief, oral submissions from the parties, the Board of Inquiry invited counsel to make written submissions on the issue. The written submissions were prepared and exchanged. Once they were all filed, the Board of Inquiry rendered an oral ruling to the parties on April 24, 1995. This interim order confirms and amplifies that oral ruling.

The Respondent is asserting that it wishes to pursue this line of inquiry with the Complainant in order to establish an evidentiary foundation for the Respondent's claim for costs. Given the fact that the Commission had indicated that it would not call the Commission's investigator or any authors of the Commission's case summary as witnesses in the case, the Respondent argued that the only Commission witness with any knowledge about this matter would be the Complainant himself. The Respondent relied heavily on the recent decision of the Divisional Court in *Northwestern Hospital, Ontario (Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital)* [1993] O.J. No. 3380 Action No. 520/93. The Respondent relies upon the following principles which were established in the *Northwestern* case.

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As the Respondent says in its submissions, the purpose of these questions is to "pursue the evidentiary foundation for its claim for costs." The Respondent's desire to pursue a claim for costs was made evident on the first day of these proceedings. Its right to preserve such a claim will not be denied. But to allow it to cross-examine the Complainant on this issue at this time will complicate the evidence, will not advance defence and it will not shed light on the merits of the case.

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These reasons were articulated to the parties on April 24, 1995. The purpose of this Award is to clarify and record the reasons for that ruling.

DATED at Toronto, Ontario, this 21st day of July 1995.



Chair
Board of Inquiry